

Pages 1 - 39

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable Phyllis J. Hamilton, Judge

"AMY," ET AL.,)	
)	
Plaintiffs,)	
)	
VS.)	NO. CV 19-02184-PJH
)	
RANDALL STEVEN CURTIS,)	
)	
Defendant.)	
_____)	

Oakland, California
Wednesday, August 28, 2019

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

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Reported By: Pamela Batalo-Hebel, CSR No. 3593, RMR, FCRR
Official Reporter

Wednesday - August 28, 2019

9:00 a.m.

P R O C E E D I N G S

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THE CLERK: Calling CV 19-2184-PJH, Amy, et al. vs. Curtis.

Counsel, please step forward and state your appearances.

MS. HEPBURN: Carol Hepburn on behalf of Plaintiffs.

MS. KAWAI: John Kawai, also for Plaintiffs.

THE COURT: All right. Good morning.

MR. BALOGH: Good morning, Your Honor. Ethan Balogh on behalf of Defendant Randall Curtis.

THE COURT: Good morning.

MR. BALOGH: Good to see you, Your Honor.

THE COURT: This matter is on for hearing. Which one of you is going to argue, or are you going to split it up?

MS. HEPBURN: I will be arguing, Your Honor.

THE COURT: Do you want to get your materials? I would like you at the podium.

MS. HEPBURN: Yes, ma'am.

THE COURT: All right. I'd like to first just clarify a few things. I would like to know if there -- there are a few inconsistencies in the pleadings, and I just want to make sure that they weren't oversight or typographical errors.

As I counted, there are 15 plaintiffs; correct?

MS. HEPBURN: Yes, Your Honor.

1 **THE COURT:** Seven of whom are identified in the
2 Complaint as being adults, which means that there are eight
3 that are minors; correct?

4 **MS. HEPBURN:** Mya has since become an adult,
5 Your Honor.

6 **THE COURT:** "Since" meaning when?

7 **MS. HEPBURN:** I don't know -- I'm sorry. Since the
8 filing of the Complaint, she's had a birthday.

9 **THE COURT:** Oh, since the filing of the Complaint,
10 which was earlier this year?

11 **MS. HEPBURN:** Yes.

12 **THE COURT:** So she's now an adult?

13 **MS. HEPBURN:** Yes.

14 **THE COURT:** Okay. But she was a minor in 2016?

15 **MS. HEPBURN:** Yes.

16 **THE COURT:** Okay. Now, there are several declarations
17 filed on the question of the victim notification. We have a
18 declaration from, let's see, someone named Marsh and then from
19 you, Ms. Hepburn.

20 **MS. HEPBURN:** Yes, correct.

21 **THE COURT:** Okay. And the names in the caption of
22 both of those declarations are the same, 15, as exist in the
23 caption of the Complaint, but in your declaration, Ms. Hepburn,
24 you name 10 of the victims, but two of the victims are Ashland
25 and Ava, who don't appear in the caption at all.

1 **MS. HEPBURN:** My apologies. I think that must be an
2 error, Your Honor.

3 **THE COURT:** Okay. That's what I assumed.

4 And then in the Marsh declaration, there are five victims
5 identified.

6 **MS. HEPBURN:** Yes.

7 **THE COURT:** But no one identifies Maureen and
8 Savannah.

9 **MS. HEPBURN:** Savannah is a minor. Maureen is an
10 adult.

11 **THE COURT:** Okay. But the problem is that neither of
12 the declarations cover Maureen and Savannah, but one of the
13 declarations cover Ashland and Ava. It seems to me that
14 perhaps those two sets of names were mixed up with maybe
15 another case or something?

16 **MS. HEPBURN:** Not from another case.

17 **THE COURT:** Anyway, you need to figure that out --

18 **MS. HEPBURN:** Yes.

19 **THE COURT:** -- because the evidence that you submit in
20 conjunction with the declarations that support that they
21 received the notification doesn't match up with all of the
22 15 --

23 **MS. HEPBURN:** I understand. I understand. I
24 apologize for that, Your Honor.

25 **THE COURT:** All right.

1 So assuming that you can clarify that, then we can move to
2 the argument.

3 We have the Defendant's motion to dismiss. Essentially
4 there are two issues: One, whether or not the Plaintiffs in
5 this case had to be a minor at the time that they were
6 victimized; and, two, whether or not personal injury was
7 suffered as a result of the violation of the statute. Those
8 are the two main issues.

9 Mr. Balogh, I have reviewed your papers. Did you wish to
10 be heard further?

11 **MR. BALOGH:** Briefly, Your Honor. I know you have
12 reviewed our papers closely.

13 The first issue -- and I think there's -- I would just add
14 one thing, too. I think you correctly framed the broad issue
15 as we brought it, which is the statute says whoever -- any
16 person who, while a minor, was a victim of one of 14 predicate
17 statutes and suffered an injury as a result of, quote, "such
18 violation," close quote, may sue, dot, dot, dot. May sue and
19 recover, I think is the phrase of the statute.

20 And one of the things we get from their opposition brief
21 actually means that all -- at a minimum, it has to be dismissed
22 without prejudice as to the pleading requirement because the
23 pleading as framed by the Defendants, what they say -- excuse
24 me -- by the Plaintiffs in their opposition brief is each of
25 the Plaintiffs, barring the two that you've identified that

1 haven't -- the victim notification issue -- each of the
2 Plaintiffs was a victim of a Section 2251 violation by -- while
3 they were a minor by somebody else. They each have their own
4 abuser.

5 And then they tell us in their opposition that as a result
6 of that 2251 violation by everybody else --

7 **THE COURT:** 2252, wasn't it?

8 **MR. BALOGH:** Their opposition says the abuse came from
9 the -- the predicate statute they invoke for their abuse as
10 minors is 2251. I will give you the page cite where they say
11 this.

12 **MS. HEPBURN:** That's correct, Your Honor.

13 **THE COURT:** Okay.

14 **MR. BALOGH:** I'll just walk you through it, if I can.

15 **THE COURT:** But Mr. Curtis pled to 2252.

16 **MR. BALOGH:** That is correct. And so what they've
17 pled is on date in the 1990s or the aughts or the teens, each
18 of us -- and they make the same allegations, so I will take the
19 hypothetical plaintiff, just for the purpose of argument, if I
20 may.

21 So Jane Doe says, "In 1992, I was a victim of a crime by
22 my uncle. My uncle abused me. He photographed it. He
23 trafficked in it. In 2016, Mr. Curtis pled guilty to a
24 different statute, 2252. And so we're suing" -- that's the
25 gravamen of the lawsuit, both violations, but the statute is --

1 the wording cannot be doubted. Whoever -- "whichever person,
2 while a minor, suffers a violation of statute acts," in this
3 case 2251 is what they plead and then sued because of such
4 violation. They're admitting they're suing because of a
5 different violation, Mr. Curtis' violation. And the statute
6 doesn't permit a mix and match.

7 And what they say in their opposition brief is, "No, the
8 predicate is 2251 by the uncle. The violation is 2251 by
9 Mr. Curtis. We can sue." And our position is no, you
10 absolutely cannot sue on that theory. What you have to say
11 under the statute is, "On date while I was a minor, I suffered
12 a violation of predicate statute," and that statute is the
13 gravamen of the suit against Mr. Curtis. It has to be based on
14 his 2252 violation.

15 And what they say, quite admirably, in their opposition
16 brief is, "That's not what we've pleaded. We pled something
17 different." And I don't think the statute permits that
18 "something different." So that would be the first argument.

19 I think for the -- the -- the girls who are now minors --
20 not minors, of majority -- they could absolutely I think
21 replead. I think they would have to plead the necessary facts.

22 But at a minimum at this point and the most narrow,
23 judicious argument -- you know, we decide as little as possible
24 to resolve the issue before the Court, you know,
25 judiciousness -- that all of them have conceded they haven't

1 pled the statute as written so none of them have stated a claim
2 upon which relief can be granted, and that would be the first
3 argument I would make today.

4 I will entertain any questions Your Honor has, but I think
5 the statute -- so we did a statutory analysis. I think the
6 Supreme Court did a very good job in *Nassar* in teaching how we
7 interpret these statutes and in *Burrage*, and the key for this
8 argument is what does "such violation" mean? It has to refer
9 back to the first violation. That's what "such" means. It's a
10 reference. It's a director, if you will.

11 So they have to plead that while a minor, the "such
12 violation," this 2252 that Mr. Curtis was convicted of -- that
13 they were a victim while a minor of that violation, and by
14 their own admission, no Plaintiff has pleaded that.

15 **THE COURT:** So you wouldn't -- so you're arguing that
16 if, indeed, as pled if they're alleging that they suffered
17 personal injury as a result of the first violation -- because
18 there were two. The women at issue were victimized once when
19 the images were created and secondly when your client viewed
20 the images.

21 **MR. BALOGH:** Allegedly, but, yes.

22 **THE COURT:** Possessed the images.

23 **MR. BALOGH:** Yes.

24 **THE COURT:** So if their intent is to hold your client
25 responsible for the injury resulting from the first, that is,

1 the creation of the image, you're saying that the statute
2 precludes that?

3 **MR. BALOGH:** Absolutely, Your Honor. And we just --
4 we walked through it, and it's just -- it's just a pure
5 statutory question. The first two -- the clause is "any person
6 who" --

7 **THE COURT:** I have it right here in front of me.

8 **MR. BALOGH:** -- "while a minor was a victim of a
9 violation of statute and" -- "and suffers a" -- "who suffers a
10 personal injury as a result of such violation."

11 So the question is what does "such violation" mean?

12 **THE COURT:** Sure. But let's assume "such violation"
13 means the creation of the image.

14 **MR. BALOGH:** Okay. Right.

15 **THE COURT:** Then the statute says they may sue, but it
16 doesn't say who they may sue.

17 **MR. BALOGH:** Right.

18 **THE COURT:** So you're arguing that they can't sue
19 someone who later views it based upon that reading of the
20 statute?

21 **MR. BALOGH:** That is correct. The question is --
22 right. It doesn't say who sues. So then the question is how
23 would you interpret the statute with its most natural meaning?

24 Now, I have seen all the photographs. Can they sue me?
25 The agent viewed all the photographs. Can they sue him?

1 Judges in these cases view all the photographs. Can we sue
2 them? And the answer would be "no."

3 The natural reading of the statute is you sue the person
4 who created the violation, who committed the violation. And
5 the "such violation" refers back to the original one.

6 And I don't -- I haven't heard my colleague identify any
7 natural reading of those first two clauses of the statute
8 that's different than mine. They just -- they just don't
9 address the "what does such violation mean?"

10 But "such violation" has to refer to the first one, and
11 then you're suing for the injury. If the injury comes from the
12 person who created it, how could you sue a third party like
13 Mr. Curtis? Because the violation -- suffers personal injury
14 as a result of such violation, then the tortfeasor is the
15 person who committed such violation.

16 **THE COURT:** What do you say to their arguments about
17 the legislative history --

18 **MR. BALOGH:** Well, I would say --

19 **THE COURT:** -- and the change in the statute?

20 **MR. BALOGH:** Well, I would say three things: One, it
21 didn't change as a result of language. The only thing that
22 changed in the statute was two things. One, it changed -- it
23 used to say "any minor who suffered a violation," dot, dot,
24 dot. So it said you don't have to be a minor when you sue, but
25 it didn't change the "such violation" language in any way,

1 shape, or form. So that predicate remains, the limitation on
2 what you can sue for.

3 And the second way I would address it is actually a
4 twofold argument. One, unless we have a natural reading that
5 is contrary to mine, we don't get to legislative history, and
6 we played out the Supreme Court's clear degradation of that as
7 a statutory tool. But even if you said, "Well, we'll consider
8 it anyway, I want to get the full picture," one of the
9 co-sponsors adopts my point of view and says no, this is about
10 the perps, it's about the abusers, the people who take the
11 pictures during the abuse and the people who traffic in them,
12 neither of which is Mr. Curtis.

13 And that will ultimately dovetail when you see how the
14 Supreme Court treats this in *Paroline* --

15 (Cellular telephone noise interruption.)

16 **MR. BALOGH:** I apologize, Your Honor.

17 There is a remarkable consistency in the legal theories
18 which show why Mr. Curtis doesn't fall within the statute. Not
19 only do we have Senator Isakson giving my interpretation, so he
20 is inconsistent. He and John Kerry, two co-sponsors, think it
21 means different things, and that's why the Supreme Court
22 degrades legislative history.

23 Apart -- even the Supreme Court teaches us you can look at
24 congressional reports, but the Congressional Record is just
25 anyone can put in whatever they want. No one knows who sees

1 it, reads it, considers it. It's, by definition, not
2 authoritative. But even if you looked at it, when we have a
3 conflict -- and I believe I gave you the citation -- to look at
4 the legislative history, then that has to overcome clearly, it
5 has to overwhelm the plain language, which it clearly does not
6 do here. You have disparate views of what it contains.

7 But *Nassar* really solves it, and *Nassar* tells us what to
8 do, and when we read the language, "such violation" has to go
9 back to the first one, and there is -- and if there is a way to
10 harmonize it that I haven't thought of, my colleagues haven't
11 thought of, I don't know of it.

12 But we start with the language, and the language is clear
13 this is aimed at the person who committed the abuse or created
14 the -- put the images in the S, if you will, such that the fear
15 and trepidation these girls or women feel today is in
16 existence. That's not Mr. Curtis.

17 **THE COURT:** All right. Do you want to move to the
18 causation issue?

19 **MR. BALOGH:** Certainly.

20 *Burrage* and *Nassar* teach us how we review "as a result
21 of," what does that mean. And *Nassar* teaches us there is a
22 presumption that that means "but for" causation. That is the
23 backdrop on which Congress litigates. It's sort of like
24 willfully both in the civil and the criminal context. Under
25 Bryan, it's a magic word. And when Congress uses a phrase that

1 has common meaning, we -- the courts say well, we assume they
2 know their meaning. They assume they know the backdrop, and
3 that's *Nassar*. *Nassar* is a civil case.

4 And then what *Burrage* teaches, which is a criminal case --
5 they build on *Nassar* but teach the same thing. And that was my
6 exact response to the Complaint, where do you start? With
7 statement of torts. What's the causation? And "as a result
8 of" means "but for" causation, unless there is a textual reason
9 not to do that.

10 And *Burrage* explained and *Paroline* explain -- *Paroline*
11 built on the same thing, which is when Congress uses that
12 phrase, we presume they mean "but for" causation.

13 And *Paroline* teaches us two things. One, that statute
14 said we're not going to use "but for" causation. It said we're
15 going to use damages, quote, "proximately caused," and because
16 of that, the Supreme Court said we're going to relax the
17 *Burrage* rule, we're going to relax the *Nassar* rule for 2559
18 because Congress has given us an indication they want to do
19 that by identifying damages that proximately caused.

20 So Congress has given us its signal. It's chosen language
21 to guide us in our interpretation, and this is how we interpret
22 it because they told us not to use "but for" causation.

23 In this case, there is no proximate cause signal, so the
24 standard -- the default rule *Nassar* and *Burrage* teach us is
25 "but for," and *Paroline* goes a step further, which is one of

1 the problems we have here.

2 *Paroline* teaches that downstream possessors of child
3 pornography cannot be the "but for" cause of the types of
4 injuries these Plaintiffs are alleging. And, in fact, one of
5 these Plaintiffs was the claimant for restitution in *Paroline*,
6 and the Supreme Court said clearly she can't establish it. She
7 can't make that standard because she claims a different type of
8 damages.

9 And I think -- I think -- theoretically I think they could
10 get a chance to replead. I think any plaintiff here, if the
11 facts are true, could say, "On date I learned about Mr. Curtis'
12 conduct. It injured me in this way." And they could try to
13 make the factual showing that his conduct and their awareness
14 of it affected them, and then that's what would be tested at
15 this trial, but they haven't done that.

16 They've done a similar thing to what the Supreme Court
17 said wasn't "but for" causation in *Paroline*, which is, "We're
18 aware generally that people like Mr. Curtis exist, and because
19 I'm aware that people like Mr. Curtis exist, that causes me
20 mental hardship. And that general awareness I want to get paid
21 for." And that's exactly what *Paroline* said is not "but for"
22 causation of personal injury, and that's the record we have
23 here.

24 So I think at a minimum, the Court has to dismiss all of
25 them without prejudice and require them to replead when they

1 learned about the conduct and how that conduct caused them each
2 personal injury. We'll explore that, and we may have a trial
3 on that, but that's what they have to do, and we're not there
4 yet.

5 I also think as a matter of law they're going to have a
6 hard time getting there because of the Supreme Court's
7 statements in *Paroline*, but, again, judiciousness, decide only
8 as much as we need to resolve the issue before the Court, I
9 think they have to do that today. So that would be my argument
10 on the second issue.

11 **THE COURT:** Okay.

12 Response?

13 **MS. HEPBURN:** Thank you, Your Honor.

14 First of all, counsel did misstate our point in our
15 responsive pleadings. We are not saying that our predicate for
16 Mr. Curtis is in fact the original contact, abuse, and
17 production of the case, but I will get to that in a minute.

18 I think what is important here is to view this issue in
19 the context of the broad remedial scheme that Congress has
20 devised and the courts have affirmed for victims of child sex
21 abuse image exploitation. That began with Section 2255 which
22 provided the civil remedy which had the option for liquidated
23 damages of \$50,000 or proof of actual damages.

24 It went on with the enactment of Section 2259, which is
25 the specific restitution statute for victims of child

1 pornography.

2 It was then expanded with the amendments in 2006 of
3 Section 2255, which not only increased the minimum liquidated
4 damages but also put in the clarifying language that the injury
5 that was being claimed civilly for need not have occurred when
6 the victim was a minor. Now, if this statute was a model of
7 clarity, we wouldn't have needed that amendment, would we?

8 The scheme that Congress has devised went on and was
9 broadened once again in 2018 with a December 7, 2018, enactment
10 of the Amy, Vickey and Andy Act which amended Section 2259 by
11 providing a minimum amount of restitution for these victims and
12 creating a compensation fund for those who find that
13 restitution and/or civil claim does not really provide them
14 reimbursement for their damages.

15 And so what you have is a broad remedial scheme which
16 Congress has expanded over time with different types of
17 remedies and with increasing the minimum amount of those
18 remedies in order to meet the scourge of child pornography
19 offenses and the devastating language that everyone has
20 recognized come from them, the courts and the Congress.

21 So let's look at the language of the statute. "Such,"
22 actually if you look at Webster's, means referring to a similar
23 kind or character or type of something, and so I think
24 Your Honor was hitting on it when you were saying that well,
25 the referral back to one of the predicate cases was of a

1 similar kind or type or character. And if you look at all the
2 predicate offenses there, the first two or three are about
3 coerced labor and labor trafficking. All the rest are about
4 some sexual-related crime about coercion, about transporting
5 minors across state lines.

6 And I think what we've -- what would be much more in line
7 with counsel's argument is if instead of the word "such,"
8 Congress would have used the word "that," so let me just read
9 the statute using that substitution.

10 "Any person who, while a minor, was a victim of a
11 violation of," and then we list the enumerated sections, "and
12 who suffers personal injury as a result of that violation,
13 regardless of whether the injury occurred while the person was
14 a minor."

15 If that were the language, it would clearly relate back to
16 the initial offense that occurred while a minor, but it
17 doesn't. It uses the word "such." And, again, the statute is
18 not a model of clarity at all.

19 And, in fact, counsel has in his reply brief some
20 discussion about surplusage, and if you look at the *Boland*
21 case, there is actually a discussion there of the issue of
22 surplusage towards the end of the opinion. It's on pages 881
23 to 882, and it talks about in this statute the words talking
24 about having been injured by the offense is really surplusage
25 for the use of the word "victim" in the early part of the

1 statute because in order to be a victim, one, of necessity, has
2 to be injured. And Scalia is quoted by the Third Circuit in
3 that particular case.

4 It's unfortunate we don't have a case which has considered
5 the precise issues before the Court at this time, and so we
6 have to look at those which have -- those cases which have
7 discussed other issues, but, again, have looked at the
8 legislative history.

9 But let me also talk about *Paroline* because *Paroline*, I
10 think, supports the Plaintiffs' side in this argument and not
11 necessarily Defense.

12 *Paroline* -- and there was some discussion, quite a bit of
13 discussion there in the briefs, in the 14 amicus briefs which
14 were submitted and the argument before the Supreme Court, about
15 the issue of aggregate causation. And the court there
16 looked -- all of the plurality decisions in that case look at
17 and recognize the unique nature of this particular injury.
18 That you have an initial insult with the hands-on offense and
19 the production of the images, but then you have the
20 re-victimization that comes over time repeatedly and
21 repeatedly. And injury is heaped upon injury upon injury upon
22 injury. And certainly Mr. Curtis is among those who have
23 injured these young women.

24 And this has been recognized over time in the *Ferber*
25 decision, in the *Osborne* decision, in the *Paroline* decision.

1 *Burrage* was a narcotics decision, and that was
2 specifically discussed in the *Paroline* case. And the court in
3 *Paroline* decided to depart from the "but for" causation, but
4 I'll get to that in a minute.

5 Again, if we look at what the result of Defendant's
6 interpretation would be, it would say that if I am a victim of
7 child pornography, that when I'm 17 and a half, I could sue one
8 of the downloaders who possessed and ogled my images, but the
9 day I reach 18 and I'm 18 years and one day, I could not, and I
10 submit that's a bizarre result, Your Honor.

11 And it flies in the face of all of the history of case law
12 which recognizes the lifelong and devastating injuries that
13 come to the victims of these crimes. It's at odds with the
14 broad remedial nature of the statutes that Congress has
15 enacted, as well as it nullifies the 2006 amendments to Section
16 2255. It is a very strange result.

17 And taking it a step further, it would actually be that
18 while I was a minor and I was not in control of what happened
19 to me legally and I had to rely on parents and others who
20 didn't protect me when I was a child to pursue my legal
21 remedies, I would have a remedy, but when I'm 18 and I can act
22 on my own behalf, I have no remedy. It makes no sense in the
23 broad scheme of things. It's an absurdity which we try to
24 avoid in statutory interpretation.

25 Other cases have looked at the legislative history, and

1 they have looked at the statements of lawmakers. The *Hekseth*
2 case that I've submitted is one that did this. That was a case
3 that looked at whether or not a civil claim under 2255 could be
4 brought after a victim received restitution, and again the
5 Court said yes. Again, we're looking at broad remedies here to
6 try and fully compensate these victims. And, again, we have
7 the *Boland* case that did as well.

8 Can I answer any questions from Your Honor about the
9 question of minor status?

10 **THE COURT:** Well, you indicated at the beginning of
11 your presentation that you were going to refute Mr. Balogh's
12 claim that the predicate act that you pled is 2251 --

13 **MS. HEPBURN:** I was trying --

14 **THE COURT:** -- as opposed to 2252.

15 **MS. HEPBURN:** We stand on the Complaint, Your Honor,
16 which says that the predicate offense is the 2252 -- is the
17 2252 offense. I was merely responding that, yes, all of these
18 victims did, as minors, suffer one of these offenses, and that
19 happened to be under 2251.

20 But if you look at the "such" wording -- and it was a bit
21 hard with the tremendous additional amount of authorities that
22 was filed in the reply as opposed to the opening brief in this
23 matter -- but if you look at the definition of the word "such"
24 in terms of a literal interpretation of the statute, that
25 "such" refers back to something of a similar character or kind,

1 and the 2251 is of a similar character or kind.

2 But we believe that status as a minor at the time of the
3 predicate offense is not a requirement, that that's a straw
4 argument in this case. And so I'm not -- I think the Complaint
5 is properly pled.

6 **THE COURT:** Okay.

7 **MS. HEPBURN:** I also think the Complaint is properly
8 pled with regard to damages. We've alleged the type of damages
9 that each of these victims has suffered as a result of child
10 pornography offenses, and we've said in our Complaint that the
11 Defendant is included among those who have perpetrated the
12 crimes and caused the damage.

13 We're acknowledging that he's not the only one, but we
14 have pled for each of them that he is certainly one of those
15 who have damaged them. We have enumerated the types of damage
16 that they suffer.

17 And we also support, as discussed about *Paroline*, that
18 there is no "but for" causation here that is required. That
19 the analogous analysis in *Paroline* -- yes, Your Honor? Did you
20 have a question? I'm sorry. I'm sorry.

21 We believe it's properly pled, and "but for" causation is
22 not a requirement, and that *Paroline* stands for that in the
23 context of child sex abuse image exploitation crimes and
24 remedies.

25 **THE COURT:** Okay. So simple proximate causation --

1 **MS. HEPBURN:** Yes.

2 **THE COURT:** -- is what you are relying upon?

3 **MS. HEPBURN:** Yes. And the fact that Congress has
4 instituted a liquidated damages provision stands for that, and
5 Congress is attempting with that to try and alleviate further
6 injury on the victims so that they don't have to come forward
7 and plead or testify with specificity about the types of
8 injuries that they have received at the hands of the defendant.

9 We have a minimum liquidated damages amount designed to
10 short circuit that and avoid further injury.

11 **THE COURT:** Okay. All right.

12 Response?

13 **MR. BALOGH:** Thank you, Your Honor. I will be brief.

14 To find my piece on the "they were going to refute," it's
15 page 10 of their brief, and here is how the Plaintiffs
16 interpret what they've pleaded.

17 "As they have alleged, Plaintiffs were all minors when the
18 images of their childhood sexual abuse were created. They were
19 each sexually abused as minors, and images, both photographs
20 and video images, of their sexual abuse were disseminated to
21 others. They are thus all victims of crimes under 18
22 United States Code Section 2251. As well" --

23 **THE COURT:** But aren't they using 2251 as sort of the
24 umbrella of the enumerated offenses?

25 **MR. BALOGH:** Right. So they're saying when they were

1 minors, that's the crime they all claim as a minor. That's the
2 first predicate of this act. "Any person, who while a minor,
3 was a victim of this violation." They say in page 10, that's
4 2251 and identify 2251 as the predicate statute of which they
5 were victims while minors.

6 That's when they pivot to, as well, Mr. Curtis possessed
7 childhood sexual abuse images, child pornography, of
8 Plaintiffs, a violation of 18 U.S.C. Section 2252, and the
9 subsequent conviction is the predicate behavior that renders
10 him liable to Plaintiffs. So that is the "such violation."
11 And "such violation" under the statute necessarily refers to
12 the statute -- to the predicate act identified in the first
13 clause which is the violation that occurred while they were
14 minors.

15 **THE COURT:** But what does the Complaint say?

16 **MR. BALOGH:** The Complaint is hard to read. It's very
17 carefully crafted. What's really clear in this case is it's
18 unclear whether any Plaintiffs even know about Randall Curtis.
19 It's unclear whether any Plaintiff knows or believes that he
20 possessed images of them.

21 That's -- what the issue in *Paroline* was, part of it
22 was -- and I believe it's Amy -- doesn't know who Paroline was.
23 They stipulated she didn't ever know about Paroline.

24 **THE COURT:** Don't the declarations indicate that they
25 were given notice?

1 **MR. BALOGH:** No. It indicates the lawyer was given
2 notice. There is nothing in this record -- and you can inquire
3 of counsel -- whether any individual Plaintiff -- and if they
4 are -- if they are minors under the age of 5 or 6, I would
5 ascribe to the rule that their guardians can speak for them,
6 but from age 6, 7, 8, the adults, not one of them says "we're
7 aware that Randall Curtis even exists," much less that "we
8 believe he did something to us," much less that "we were
9 personally injured as a result of his conduct." None of that
10 is pleaded, and that was one of our complaints, which is that's
11 the bare minimum. You can't say -- you can't say he harmed you
12 unless you know of him. If a tree falls in the forest and no
13 one is there to hear it, you cannot go deaf by definition, and
14 you can't blame your deafness on the defendant.

15 And here, not one Plaintiff -- you can just inquire, does
16 any individual Plaintiff actually have an understanding and
17 belief of what Mr. Curtis did and that understanding led to
18 harm to them? Because that's the predicate; right? That is
19 one much the predicates. Put aside the statutory analysis
20 which is that predicate had to occur when they were a minor.
21 If we put --

22 **THE COURT:** So I should construe the declaration as
23 the lawyers, on behalf of their clients, received a copy of the
24 victim notification --

25 **MR. BALOGH:** Yes.

1 **THE COURT:** -- that indeed their image was found on
2 Mr. Curtis' computer, and I am to presume that they never
3 conveyed that information to their client?

4 **MR. BALOGH:** Yes. Well, that's what -- that's what
5 they pled to in *Paroline*. They pled those facts for Amy.
6 *Paroline* went to the United States Supreme Court on that
7 record. And just to be clear -- and I'm sure I'll be confirmed
8 by counsel -- in some of these other cases, they're often the
9 lawyers on these other cases which they have cited or some of
10 the cases in the case law. They are prosecuting these cases on
11 a broader basis than this Court.

12 That is a common feature of these cases. The plaintiff
13 doesn't personally know of the defendant's conduct. It's a
14 common feature, and I don't know whether that's a feature of
15 this case, but no Plaintiff has pled, no Plaintiff has made the
16 affirmative representation that "I, the individual, got
17 information about Mr. Curtis, and based on that information, it
18 affected me in an identifiable way." Not one Plaintiff has
19 said that as of this date.

20 And I think that's a necessary step to establish -- even
21 to make a claim for personal injury -- that you have to be
22 aware of Defendant's conduct. They --

23 **THE COURT:** I don't understand. Why do you think they
24 have filed a lawsuit if they're not aware of the Defendant's
25 conduct?

1 **MR. BALOGH:** Because the lawyers are. I think they
2 are acting under Power of Attorney. I don't think they -- they
3 didn't even sign the ADR certification. The ADR certification
4 in this court says "lawyer and plaintiff." "Lawyer and party."
5 "Lawyer and party." My client signed it. I signed it. Not
6 one Plaintiff signed it. John Kawai signed on behalf of
7 Plaintiff, unidentified, for the 15 plaintiffs. Not even one
8 Plaintiff has certified the ADR certification.

9 **THE COURT:** Most of our declarations that are filed on
10 behalf of minors don't include the minor's signature.

11 **MR. BALOGH:** Well, there is guardians for the minors
12 here. They are John Doe and Jane Doe and I think there are a
13 couple of other names. They didn't sign it. They would have
14 the authority.

15 For the minors, I agree, the guardians have authority, but
16 the guardians haven't signed it, and we have eight adults who
17 are in this lawsuit, and none of them have signed it. So I'm
18 saying none. It's zero. The answer is zero. Not one
19 Plaintiff at any point --

20 **THE COURT:** Well, we're not adjudicating the
21 legitimacy of the ADR certificate at this time.

22 **MR. BALOGH:** Right.

23 **THE COURT:** We're only looking at the Complaint. This
24 is a motion going to the pleadings.

25 **MR. BALOGH:** Right. And my point -- I was making a

1 broader point of what the concern is here about damages, but
2 the pleadings are -- I stand by my arguments on the statutory
3 interpretation. I was just sort of giving some color to that
4 of sort of the broader concerns of this case.

5 And I guess my final response is I think the answer is
6 what Senator Isakson said. This statute doesn't reach
7 downstream possession, and the reason it doesn't reach
8 downstream possession is because downstream possessors don't
9 harm the victims.

10 The harm to the victims comes from two sources -- this is
11 what *Paroline* said -- the people that abuse and photograph and
12 the initial distributors who make it available. Those are the
13 individuals, the perps, the criminals who actually cause harm.

14 And the claim here is, "Well, it's in the S. I -- I have
15 anxiety because anyone could download it today," and that is
16 not harm.

17 **THE COURT:** Your argument is that hundreds, if not
18 thousands, of people viewing the images causes no harm to the
19 victims?

20 **MR. BALOGH:** Yes. I think that harm flows from the
21 distributor, not from the -- not from the downstream
22 possessors.

23 **THE COURT:** If there weren't a demand for the images,
24 then there wouldn't be any incentive to create this kind of
25 contraband, would there be?

1 **MR. BALOGH:** Well, I don't know that that's
2 necessarily true. My sense is these cases -- there is actual
3 pedophilia, there is mental disruption, there's people that --
4 I don't think the people that are creating this, the men that
5 abuse these girls -- I would be hard-pressed to believe they
6 were doing a market analysis of the system before they decided
7 to do the terrible acts they did.

8 I think the uncle example is a terribly depraved human
9 being who abused his niece -- abused his nieces,
10 photographed them --

11 **THE COURT:** Let me just ask you, if someone creates
12 child pornography and then it's destroyed and no one sees it --

13 **MR. BALOGH:** Okay.

14 **THE COURT:** -- there is no further harm from the
15 creation, the harm is solely from the abuse that occurred
16 during the creation of the image; correct?

17 **MR. BALOGH:** Correct.

18 **THE COURT:** Are you saying that that's the same as the
19 situation where there is indeed a product that's created that's
20 not destroyed but is shared with hundreds of other people?

21 **MR. BALOGH:** I think --

22 **THE COURT:** You're saying that that sharing and the --
23 what's the language used by the cases? It's the trade in their
24 images. The fact that the images are being shared with
25 hundreds of other people doesn't create any more of a problem

1 than the situation where the images are destroyed immediately?

2 **MR. BALOGH:** No. I'm saying the damage flows from the
3 person who distributes it. So if you want to take a -- let's
4 take Johnson & Johnson opiates, for something in the news.
5 Perp 1 creates the opiates in Tasmania. Super powerful. That
6 person introduces that to the stream of commerce. That's the
7 harm. The person who abused and distributed harms the victim.

8 But the same reason I didn't hurt any Plaintiff in this
9 case when I went down to Justice and they put it on the
10 computer for me and we examined evidence, and just how if we
11 have a trial in this courtroom, neither your conduct of
12 overseeing the evidence nor the jurors' conduct in reviewing
13 and assessing it to determine are these girls who they claim to
14 be, is this child pornography, those people don't harm the
15 girls.

16 **THE COURT:** Mr. Balogh, I think that's a very
17 interesting argument and that's one that perhaps the jury will
18 decide in this case. I'm certainly not prepared at this
19 juncture of the case to agree with you that there's no harm to
20 the victims from hundreds, thousands of people looking at the
21 images that were created of their abuse. I'm not going that
22 far.

23 **MR. BALOGH:** Just to be clear --

24 **THE COURT:** Excuse me. Don't interrupt me.

25 **MR. BALOGH:** I'm sorry, Your Honor.

1 **THE COURT:** That is not something that I will reach in
2 this case, and if I were to reach it, it would not be in your
3 favor, so I think you should stop arguing that particular point
4 at this time.

5 **MR. BALOGH:** Can I clarify, Your Honor, because that's
6 not what I'm arguing.

7 The harm is real. The question is who is the burden of
8 the harm on, who is the causer of the harm.

9 My argument is it comes from the distributor. That causes
10 the harm. It's the person who takes it and provides it --

11 **THE COURT:** No.

12 **MR. BALOGH:** But for that conduct, nothing gets seen.
13 But for --

14 **THE COURT:** I don't agree with you that there is no
15 harm caused by people looking at the images of violence
16 perpetrated against these young girls. I don't agree with you.

17 **MR. BALOGH:** Thank you, Your Honor.

18 **THE COURT:** All right. But I don't know that I need
19 to decide that in order to decide this case.

20 Anything else on the issues that have been raised here?

21 **MS. HEPBURN:** I might just add that as among this
22 group of Plaintiffs, some do receive the images; some have
23 elected -- I'm sorry -- some receive the notices, Your Honor,
24 directly, in addition to counsel; some just receive them from
25 counsel. Some of counsel's statement would invade the

1 attorney-client privilege in terms of what our communications
2 are.

3 I can speak to any further facts that the Court is
4 interested in --

5 **THE COURT:** Well, given that you raised it, what's
6 your response to counsel's argument that no one has -- I don't
7 have the Complaint in front of me, but his argument is that no
8 one has pled that they have any awareness that Mr. Curtis
9 viewed their images much less that they were harmed thereby.

10 **MS. HEPBURN:** Not specifically in those words,
11 Your Honor, but I don't believe that that's again a requisite.
12 If we can analogize to *Paroline* again, the parties specifically
13 stipulated in that matter that Mr. Paroline had two images,
14 that he did not know Amy, never known of Amy, and that Amy did
15 not know of him until the court case arrived, and so, you know,
16 it's an exactly analogous situation.

17 But, no, we haven't pled it because we didn't think it was
18 necessary.

19 **THE COURT:** Okay. All right. The matter is
20 submitted. Thank you.

21 **MR. BALOGH:** Thank you, Your Honor.

22 Can I ask a question before you dismiss us for the day,
23 Your Honor?

24 **THE COURT:** Yes.

25 **MR. BALOGH:** Stranger in a strange land. I know the

1 courtroom; not my normal setting on how we go forward.

2 We have a CMC in October, and we have -- the issue that's
3 arisen is whether or not we can depose the guardians of the
4 minors and whether or not we can depose the adults or obtain
5 discovery from them directly.

6 The Plaintiffs' position is we can't do that. My act --

7 **THE COURT:** The adults -- the adult plaintiffs?

8 **MR. BALOGH:** Yes. So I can't -- the Plaintiffs'
9 position is whether the -- I can't depose the guardians of the
10 minors and I can't depose the adult plaintiffs, and I can't
11 know their names, I can't investigate them, I can't do
12 anything, and they want to the litigate that because my act of
13 conducting discovery to have them prove their claims that
14 they've brought would hurt them, is their theory, and so
15 because I would -- by just seeking discovery in support of
16 their claims, I would cause harm to them, that I'm not entitled
17 to it in this case, and we're going to proceed without that.

18 I obviously think I'm entitled to test the allegations and
19 to obtain discovery and to ask questions of the Plaintiffs, and
20 if they're minors, to ask questions of their guardians, who
21 will speak for them because the children are children. I don't
22 see at this point any need to do anything but examine their
23 guardians.

24 And we have a CMC now in October. I know the Court
25 somewhat from experience, that we'll get an order about today's

1 proceedings in the near term.

2 To litigate that discovery issue, should we just bring
3 that directly to the magistrate?

4 **THE COURT:** I don't understand why this is an issue.
5 I don't understand the Plaintiffs' position.

6 **MS. HEPBURN:** The Plaintiffs are concerned again about
7 further injury and about anonymity, and the Court has granted
8 our motion to proceed via pseudonym.

9 We are prepared to present proof on the identity issue in
10 terms of yes, these Plaintiffs are those who, as children, were
11 depicted in the images that Mr. Curtis had and that were seized
12 by law enforcement.

13 We believe that with the liquidated damages provision of
14 the statute that there is not the need to go through the
15 grinding discovery about "were you injured" and "how were you
16 injured" and "how has that affected you," and that that would
17 only reinjure.

18 **THE COURT:** That would go to damages, perhaps, and
19 we're talking about perhaps the amount of damages, but that
20 doesn't answer the question of liability in this case. This is
21 not a strict liability case. You still have to prove --

22 **MS. HEPBURN:** Well, but we believe the issue is
23 identity, which we're prepared to prove, and beyond that, we
24 believe the case law says that being a victim of child
25 pornography is itself an injurious state of being, and we've

1 all opted for the liquidated damages provision as to -- as
2 opposed to proving an amount of actual damages.

3 **THE COURT:** Okay. I don't have any problem with that,
4 but there's still the question of causation. It's not just
5 damages.

6 **MS. HEPBURN:** Is this something that we can present on
7 a motion, Your Honor, as opposed to on the fly?

8 **THE COURT:** I don't, frankly, need a motion if this is
9 all the argument there is. You're the Plaintiffs. You have to
10 prove the case. The Defendant is entitled to defend him or
11 herself.

12 It's unheard of that civil litigation would proceed
13 without allowing the Defense to take the depositions of the
14 Plaintiffs, the guardians for the minors. They can certainly
15 proceed pseudonymously -- however you pronounce that word --
16 using the pseudonyms that they've adopted for purposes of the
17 Complaint and procedures thus far. They don't have to reveal
18 their true identities, assuming that these aren't legitimately
19 their first names. I don't really know because I know
20 Magistrate Judge Kim ruled on those matters.

21 They can maintain their anonymity, but that doesn't mean
22 that the attorney representing the Defendant can't take their
23 depositions.

24 **MS. HEPBURN:** We have forensic psychological reports
25 and psychologists who can certainly be presented and be deposed

1 ad nauseam on the damages that all of these Plaintiffs have
2 suffered, and those have been sufficient for purposes of
3 restitution in each and every case.

4 **THE COURT:** Restitution when ordered in a context of a
5 civil case? A criminal case?

6 **MS. HEPBURN:** No. In a criminal case, Your Honor.

7 **THE COURT:** Okay. But this is a civil -- this is a
8 civil case whereby you are attempting to secure on behalf of
9 the Plaintiffs damages in excess of what's permitted by the
10 restitution statute or by the stipulation for restitution that
11 was entered in this particular case.

12 **MS. HEPBURN:** Correct.

13 **THE COURT:** This is a civil case, and unless you
14 present a Ninth Circuit case that says victims of this
15 particular kind of crime cannot be deposed, I would permit the
16 Defense to depose them, them or their guardians, if they are
17 minors. Period. I don't need any motions about that, unless
18 there is a case exactly on point. If there is, send it to me.

19 **MS. HEPBURN:** Okay. Thank you, Your Honor.

20 **MR. BALOGH:** The one thing I would like to address
21 briefly -- thank you, Your Honor -- is I agree that they should
22 be allowed to preside under pseudonyms publicly, but I disagree
23 that I don't get that information. And in this case,
24 Judge Illston ordered those names disclosed to me even for
25 restitution, but rather than proceed that way, we had a

1 negotiation with the Government before they released the names.
2 And Judge Kim issued her order because it was unopposed, even
3 though they didn't serve Mr. Curtis until after they got the
4 order. So it's not been litigated. Judge Kim issued an order
5 as unopposed because the Defendant had not been served. So
6 it's kind of an unfair order.

7 But the substance of the order I agree with. I have no
8 desire and I don't believe they should publicly identify any
9 plaintiff in this case. Full stop. There's appropriate
10 grounds for that. I have litigated enough of these types of
11 matters to be very comfortable with the protection of their
12 identities.

13 It's a totally different matter to hide them from the
14 Defense. And what the case law -- even the lead case they
15 cited was -- the Ninth Circuit case was until class
16 certification issued, we don't have to know the named
17 plaintiffs. But the standard is ultimately I get the -- I get
18 the names, and if you want to exclude them from my client, AEO,
19 that's fine, too. He is doing 10 years and is a guest of the
20 United States. He doesn't need the names.

21 But I'm entitled to investigate each and every Plaintiff
22 to understand the bona fides of their claims, and obviously I'm
23 going to be respectful of each of these individuals and be
24 sensitive to the matter at hand, but I would -- if the Court
25 is --

1 **THE COURT:** Have you all met and conferred about a
2 protective order in this case?

3 **MR. BALOGH:** We have, but the position on pseudonyms
4 and the depositions they were firm on. And so we have
5 discussed --

6 **THE COURT:** Well, you need to go back. I've stated
7 what my position is on the use of pseudonyms and the
8 depositions. You need to go back and meet and confer on the
9 question of whether or not the actual identities -- first I've
10 thought about it. I would entertain briefing on that if
11 there's some cases on point that you all can provide, but you
12 need to meet and confer on it first.

13 **MR. BALOGH:** Yes, Your Honor.

14 **MS. HEPBURN:** May I respond to what I believe is a
15 misrepresentation that counsel has made because I've been in
16 extensive communications with Julie Garcia, the AUSA on this
17 matter, and reviewed the stipulation and order, protective
18 order in the criminal matter, and it doesn't say that in
19 fact -- and Ms. Garcia pointed this out to me ad nauseam
20 because we were quite concerned about this; that, in fact, the
21 identifying information was provided to Mr. Balogh. And when I
22 have pointedly asked Mr. Balogh about whether he received
23 identifying information, he refused to tell me and told me I
24 needed to exercise my tools of discovery. But if you read the
25 order, it says that if the --

1 **THE COURT:** Which order?

2 **MS. HEPBURN:** I'm sorry. The order in the criminal
3 matter concerning highly confidential discovery material.

4 It says if the Government discloses that information, then
5 X, Y, Z protections will be in place.

6 Now, I didn't come prepared to argue that today, but I can
7 tell you I have had at least five conversations, extensive
8 emails, with Ms. Garcia about this.

9 **THE COURT:** Okay. All right. I don't know --

10 **MR. BALOGH:** We'll meet and confer.

11 **THE COURT:** -- the parameters of this argument. You
12 need to meet and confer.

13 **MS. HEPBURN:** Yes.

14 **THE COURT:** I have indicated to you that I will permit
15 depositions. They may proceed using their pseudonyms
16 throughout the course of the depositions and all the rest of
17 the litigation unless you show me a Ninth Circuit case that
18 says that they are -- the Defense is not entitled to be able to
19 take depositions.

20 **MS. HEPBURN:** I understand --

21 **THE COURT:** On the question of whether or not you get
22 the identity -- the real identity, I have no idea what has
23 transpired in the criminal case, whether or not that
24 information has been provided or not. I don't have a position
25 on it.

1 I expect you all to meet and confer. This is a civil
2 case. I expect you to be able to resolve it. If you're unable
3 to do so, whichever party -- either side can file a five-page
4 letter brief to me setting forth the nature of the dispute and
5 the nature of the -- where you all disagree, and I'll resolve
6 it.

7 Actually, it's a joint letter brief, is what we require
8 for discovery disputes. It's a five-page joint letter brief
9 setting forth the dispute over the identities, and I'll make a
10 decision on it.

11 **MS. HEPBURN:** Thank you.

12 **MR. BALOGH:** Thank you, Your Honor.

13 **THE COURT:** Is there anything else?

14 **MR. BALOGH:** No, Your Honor. Thanks for your patience
15 today.

16 **THE COURT:** All right. We're adjourned.

17 (Proceedings adjourned at 9:53 a.m.)
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CERTIFICATE OF REPORTER

I certify that the foregoing is a correct transcript
from the record of proceedings in the above-entitled matter.

DATE: Friday, August 30, 2019

Pamela Batalo Hebel

Pamela Batalo Hebel, CSR No. 3593, RMR, FCRR
U.S. Court Reporter